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No. 06-1431

Supreme Court, U.S.
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In The
Supreme Court of the United States

CBOCS WEST, INC.,

Petitioner,

v.

HEDRICK G. HUMPHRIES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

In asking the Court to grant review of the issue whether retaliation claims are cognizable under 42 U.S.C. § 1981, Petitioner CBOCS West, Inc. ("Cracker Barrel") repeatedly states that the issue suffers from jurisprudential "vacillation and uncertainty." Such "vacillation and uncertainty," however, exists only in Cracker Barrel's imagination. All eight circuits to consider the question have unanimously recognized retaliation claims under section 1981. Moreover, this Court held only two years ago in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), that retaliation is a form of discrimination, and in doing so reaffirmed the holding in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that retaliation claims are cognizable under 42 U.S.C. § 1982, the companion statute to section 1981. There is no confusion, no vacillation, and no uncertainty. There is simply no reason for the Court to grant Cracker Barrel's petition for a writ of certiorari.

STATEMENT OF THE CASE

Respondent Hedrick Humphries, an African-American, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. Pet. App. 3a. He complained to his supervisors about race discrimination, and Cracker Barrel fired him shortly thereafter. Pet. App. 4a-5a. Mr. Humphries timely filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which conducted an investigation and issued Mr. Humphries a right-to-sue letter. Within ninety days of receiving the letter, Mr. Humphries timely filed a *pro se* complaint against Cracker Barrel, alleging race discrimination and

retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981.

At the same time he filed his *pro se* complaint, Mr. Humphries filed an application to proceed *in forma pauperis* ("IFP"). The district court denied the application partly because Mr. Humphries did not provide the court enough information about his expenses. Although Mr. Humphries filed two amended IFP applications to clarify those issues, the district court denied both amended applications and ordered Mr. Humphries to pay the filing fee, which he did on January 12, 2004.

Cracker Barrel then moved to dismiss the Title VII claims on the ground that Mr. Humphries did not pay his filing fee within ninety days after receiving his right-to-sue letter. By this time, Mr. Humphries had retained counsel, who argued that the IFP applications tolled the time to pay the filing fee and that Mr. Humphries had paid the fee when the court ordered him to do so. The district court nevertheless dismissed Mr. Humphries' Title VII claims, and the case proceeded on the section 1981 claims only. Those claims were dismissed on summary judgment in October 2005. In the district court, Cracker Barrel failed to raise any argument that retaliation claims are not cognizable under section 1981. Pet. App. 5a-6a. When Mr. Humphries appealed the dismissal of the section 1981 claims, he did not appeal the dismissal of his Title VII claims because Cracker Barrel had not previously challenged the viability of his claims under section 1981. Nonetheless, on appeal Cracker Barrel argued for the first time that retaliation claims are not cognizable under section 1981. *Id.* The Seventh Circuit rejected that argument and reversed the grant of summary judgment.

The sole issue that Cracker Barrel asks the Court to review is whether retaliation claims are cognizable under section 1981, which states as follows:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The language in section 1981(a) was initially part of section 1 of the Civil Rights Act of 1866 ("1866 Act"), which was later broken into section 1981 and its companion statute section 1982. *See, e.g., Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372 (2004) (discussing history of section 1981); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 383-84 (1982) (same, and referring to sections 1981 and 1982 as "companion" statutes); *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (same); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973) (discussing the "historical relationship" between sections 1981 and 1982). The language in sections 1981(b) and (c)

was added in 1991 when Congress enacted the Civil Rights Act of 1991 ("1991 Act"), Pub. L. No. 102-166, 105 Stat. 1071.

Congress passed the 1991 Act in direct response to this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 177 (1989), which narrowly interpreted the phrase "make and enforce contracts" as excluding "conduct by the employer after the contract relation has been established." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (finding that section 101 of the 1991 Act "amended the 1866 Civil Rights Act's prohibition of racial discrimination in the 'making and enforcement [of] contracts' in response to *Patterson v. McLean Credit Union*") (citations omitted). Prior to *Patterson*, there was a "general consensus" in the circuit courts that section 1981 prohibited retaliation. *Humphries v. CBOCS West, Inc.*, Pet. App. 12a; *see also Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 42-43 (2d Cir. 1984). *Patterson* changed that legal landscape, and in response Congress amended section 1981 to add the broad definition of "make and enforce contracts" that is quoted above. Congress titled this section of the 1991 Act "Prohibition Against *All* Racial Discrimination in the Making and Enforcement of Contracts." Civil Rights Act of 1991, § 101 (emphasis added).

As explained below, all circuits that have analyzed the 1991 amendment to section 1981 have interpreted it to prohibit retaliation. That unanimous conclusion is consistent with the Court's decisions in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Also supporting that result is the text of the 1991 Act, the House Committee Report for the 1991 Act, and public policy encouraging the enforcement of civil rights statutes.

Finally, the Court should deny the writ because Cracker Barrel sandbagged Mr. Humphries by first raising its section 1981 argument after it was too late to appeal the district court's Title VII ruling.

REASONS FOR DENYING THE WRIT

A. The Circuit Courts Agree That Retaliation Claims Are Cognizable Under Section 1981.

Despite Cracker Barrel's claim of widespread "vacillation and uncertainty" on this issue, there is simply no split of authority in the circuit courts regarding whether retaliation claims are cognizable under section 1981. All eight circuits to address this issue – the Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh – unanimously hold that section 1981 prohibits retaliation. *See Aleman v. Chugach Support Serv.*, 485 F.3d 206, 213-14 (4th Cir. 2007) (rejecting argument that "Section 1981 does not contain an anti-retaliation provision" because "it is foreclosed by Supreme Court and circuit precedent, which hold retaliation to be a form of differential treatment subsumed in the antidiscrimination language of Section 1981"); Pet. App. 20a ("[T]he issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does."); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) ("We hold that an employee's claim that he was subjected to retaliation because he complained of race discrimination is a cognizable claim under § 1981(b)."); *Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 800-01 (9th Cir. 2003) (reaffirming prior holding that where "a plaintiff charges an employer with racial discrimination in taking retaliatory action, a cause of action under § 1981

has been stated"); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1258 (10th Cir. 2001) ("Both Title VII and § 1981 support a cause of action for retaliation."); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998) ("We remain of the view, in light of the broad sweep of § 1981(b), that a retaliation claim may be brought under § 1981."); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1412-13 (11th Cir. 1998) (claim alleging "retaliation due to filing a race-based claim with the EEOC . . . is cognizable under the amended section 1981"); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1054, 1059 (8th Cir. 1997) ("[A] claim of retaliation, in a racial discrimination context, can violate both Title VII and 42 U.S.C. § 1981.").

Confronted with the unanimity of the circuits on this issue, Cracker Barrel attempts to create legal uncertainty where none exists by arguing that the Seventh and Eleventh Circuits recently "reversed course" on this issue. Pet. 7, 9. Not true. Both circuits agree that retaliation claims arising after the 1991 Act may be brought under section 1981, and they never held otherwise. Pet. App. 20a; *Andrews*, 140 F.3d at 1412-13. Although both circuits limited standing to bring a retaliation claim under section 1981 to individuals who complained of discrimination they personally suffered, *see Hart v. Transit Mgmt. of Racine, Inc.*, 426 F.3d 863, 865-66 (7th Cir. 2005), and *Little v. United Techs.*, 103 F.3d 956, 961 (11th Cir. 1997), neither circuit held that retaliation was never actionable under section 1981.[1] Indeed, that was an open issue in the

[1] The Seventh Circuit overruled *Hart* on an issue not presented here, *i.e.*, whether an individual may sue under section 1981 for being retaliated against for opposing discrimination suffered by someone outside his or her protected class. Pet. App. 30a-31a. The Eleventh Circuit has yet to revisit that issue in light of this Court's decision in

(Continued on following page)

Seventh Circuit before *Humphries* was decided. Pet. App. 19a ("This is the first opportunity we have had since the enactment of the Civil Rights Act of 1991 to revisit the issue of whether section 1981 forbids all retaliatory discharge claims. Cracker Barrel contends that our decision in *Hart* has already foreclosed retaliation claims under section 1981. This is incorrect.") (citation omitted). The Eleventh Circuit likewise noted that, after *Little*, the issue whether section 1981 forbids retaliation "remained open" in the Eleventh Circuit. *Andrews*, 140 F.3d at 1412. Thus, neither circuit changed course on this issue as claimed by Cracker Barrel. Pet. 7.

Cracker Barrel's characterization that there is an "apparent intra-circuit split" on this issue in the Sixth Circuit is equally misleading. Pet. 8. The Sixth Circuit has not yet decided whether after the 1991 Act retaliation claims are cognizable under section 1981. It has hinted in dicta that it would recognize such claims, but the issue has not been squarely before it. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 573-76 (6th Cir. 2000) (relying heavily on *Sullivan* and observing that "it is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981 . . . for discrimination based upon his advocacy on behalf of minorities . . . "). Cracker Barrel suggests that *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984), is evidence of an internal split, but that case is inapposite for two reasons. First, *Day* was

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Jackson. And contrary to Cracker Barrel's argument, *Andrews* does not conflict with *Little*. Pet. 7. The plaintiff in *Andrews* was retaliated against for complaining about discrimination she personally suffered, while the *Little* plaintiff, like the *Hart* plaintiff, complained of retaliation for opposing discrimination suffered by someone outside her protected class. *Andrews*, 140 F.3d at 1412-13.

decided before both *Patterson* and the 1991 Act. Second, the section 1981 claim in *Day* was abandoned on appeal, and the Sixth Circuit therefore reached no conclusion about whether retaliation claims are viable under section 1981. *Day*, 749 F.2d at 1202. Moreover, even if there were an "intra-circuit split" in the Sixth Circuit, that would still not warrant review by the Court. *See* S. Ct. Rule 10. The Sixth Circuit is capable of and responsible for resolving any internal conflict by, for example, conducting an en banc review. *See Gaddis v. Redford Twp.*, 364 F.3d 763, 770 (6th Cir. 2004) ("We have a settled procedure for resolving cases of intra-circuit conflict."). Therefore, nothing about the state of the law in the Sixth Circuit supports Cracker Barrel's petition for a writ of certiorari.

In sum, the circuit courts to consider this issue are in agreement that retaliation claims are cognizable under section 1981. In fact, just two months ago in an opinion written by Judge Wilkinson, the Fourth Circuit joined the other circuits on this issue. *Aleman*, 485 F.3d at 213-14. Thus, because there is no confusion, no disagreement, and no split in the circuits for this Court to resolve, Cracker Barrel's petition should be denied.

B. The Issue Is Already Settled By Supreme Court Precedent.

It is no surprise that there is no circuit split on this issue because Supreme Court precedent has settled the question. Two of the Court's decisions, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), taken separately or together, resolve the question whether retaliation claims are cognizable under section 1981. Those cases

hold that (1) section 1982 (the companion statute to section 1981) supports retaliation claims, *see Sullivan*, 396 U.S. at 237; and (2) retaliation "is a form of 'discrimination' because the complainant is being subjected to differential treatment," *Jackson*, 544 U.S. at 174.

In *Sullivan*, a white homeowner rented a house to a black man and sought to assign him a membership interest in a private community park. 396 U.S. at 234-35. The corporation that owned the park refused to approve the assignment to a black man, and when the white homeowner protested, the corporation retaliated by expelling him from the corporation. *Id.* The Supreme Court recognized the white homeowner's right to sue under section 1982 because he had been "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* Although the word "retaliation" never appears in *Sullivan* or in the text of section 1982, this Court later explained that "in *Sullivan* we interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson*, 544 U.S. at 176.

The applicability of *Sullivan* to section 1981 cannot be questioned because both sections 1981 and 1982 were carved from section 1 of the Civil Rights Act of 1866 and therefore share the same general purpose and historical origins. *See, e.g., Gen. Bldg. Contractors*, 458 U.S. at 384; *Runyon*, 427 U.S. at 170; *Tillman*, 410 U.S. at 439-40. There is simply no meaningful analytical reason to conclude that section 1982 prohibits retaliation while section 1981 does not. Indeed, this Court often looks to section 1982 to interpret section 1981. *See Gen. Bldg. Contractors*, 458 U.S. at 384; *Runyon*, 427 U.S. at 170; *Tillman*, 410 U.S. at 439-40. For example, in *Runyon*, the Court relied on *Jones v. Alfred*

H. Mayer Co., 392 U.S. 409, 423-24 (1968), a case holding that section 1982 prohibits discrimination in the private sector as well as by state actors, to hold that section 1981 also applies in the private sector. *Sullivan* was decided nearly 40 years ago, and Congress has not deemed it necessary to alter its holding that retaliation claims are actionable under section 1982. In fact, in passing the 1991 Act, Congress *strengthened* section 1981, knowing that the Court uses the same principles to interpret sections 1981 and 1982.[2] Thus, the Court should deny Cracker Barrel's petition because the matter is settled by *Sullivan*.

More recent Supreme Court precedent also eliminates any need for review of this case. In *Jackson v. Birmingham Board of Education*, a male coach of a high school girls' basketball team complained to his supervisors that the girls' team did not receive equal funding and access to athletic equipment and facilities. 544 U.S. at 171-72. In retaliation for his complaints, he was removed as the team's coach. *Id.* at 172. The coach sued under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

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[2] Because *Sullivan* interprets a statute, as opposed to the Constitution, this Court gives it special deference as precedent. *Patterson*, 491 U.S. at 172-73 ("[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

education program or activity receiving Federal financial assistance."

The lower courts had held that the coach could not bring a retaliation claim under Title IX because the word "retaliation" does not appear in the statute. In rejecting that overly restrictive reading of Title IX, this Court held that retaliation is a form of discrimination and as such is a cognizable claim under Title IX:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. **Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.** We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

Jackson, 544 U.S. at 173-74 (bold emphasis added, italics in original).

Jackson is on point here because, like Title IX, section 1981 does not use the word "retaliation" and instead broadly prohibits differential treatment. According to *Jackson*, that broad prohibition encompasses retaliation because retaliation is differential treatment on the basis of a complaint *about discrimination*. That rationale applies equally to section 1981 because retaliation for opposing

race discrimination is differential treatment based on the racial nature of the complaint. Further proof that *Jackson* resolved this issue in the context of section 1981 is that *Jackson* relied heavily on *Sullivan* and expressly concluded that "retaliation for advocacy on behalf of a black lessee in *Sullivan* was *discrimination on the basis of race*." *Id.* at 176-77 (emphasis added).

In holding that retaliation is a form of discrimination prohibited by Title IX, *Jackson* reasoned that it should interpret Title IX broadly because Congress wrote it in broad terms and therefore "gave the statute a broad reach." *Id.* at 175. Likewise, section 1981 is written in broad terms, and it simply cannot be disputed that Congress – both in 1866 and in 1991 – intended to give section 1981 a broad reach. The careful and thorough analysis of the 1866 Act in *Jones v. Alfred H. Mayer Co.*, leaves no doubt that Congress intended the 1866 Act to have an expansive scope. 392 U.S. at 422 & 426-27 (holding that the 1866 Act "was cast in sweeping terms" to prohibit "*all* racially motivated deprivations of the rights enumerated in the statute" and further stating that such "broad language" was not a "mere slip of the legislative pen") (emphasis in original). *See also Sullivan*, 396 U.S. at 237 (cautioning against a "narrow construction of the language of § 1982" because it "would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived."). And in 1991, Congress strengthened and expanded the broad sweep of section 1981. *Rivers v. Ry. Express, Inc.*, 511 U.S. 298, 303 (1994); *Jones,* 541 U.S. at 372 n.17. The very first sentence of the 1991 Act states that it is intended to "*strengthen and improve* Federal civil rights laws . . . " Civil Rights Act of

1991, 105 Stat. at 1071 (emphasis added). The statute further states that one of its purposes is "to respond to recent decisions of the Supreme Court by *expanding* the scope of the relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* at Sec. 3(4) (emphasis added). Because section 1981 is an intentionally broadly written statute, the holding in *Jackson* that retaliation is a form of discrimination applies with equal force to section 1981.

Sullivan and *Jackson* already resolved all the issues needed to determine whether section 1981 prohibits retaliation. *Jackson* is a very recent case, and the holding in *Sullivan* was reaffirmed in *Jackson*. Neither *Sullivan* nor *Jackson* has caused confusion in the circuit courts, which all agree that retaliation claims are cognizable under section 1981. Thus, because this Court has already spoken on these issues, and because there is no confusion in the circuit courts, the Court need not grant Cracker Barrel's petition for a writ of certiorari.

C. The Seventh Circuit's Interpretation Of Section 1981 Is Uncontroversial And Appropriate.

Cracker Barrel contends that this Court should grant review because *Humphries* "ignore[d]" the text of the statute and "relied heavily, if not exclusively," on the legislative history of section 1981. Pet. 9. Nothing could be further from the truth, as even a cursory reading of the opinion makes clear. Instead, Cracker Barrel is really claiming that because section 1981 does not use the word "retaliation," the Seventh Circuit's analysis has no "textual support." Pet. 9. Cracker Barrel is wrong.

The structure and language of section 1981(b) make clear that it prohibits retaliation. Section 1981(b) states "for purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." It is unsurprising that this list, which is cast in terms of the most basic categories of contract activity – performance, modification, and termination – does not refer to the legal claim of retaliation, or, for that matter, discrimination and harassment. Yet there has never been any doubt that racial discrimination claims are actionable under section 1981. *See, e.g., Runyon*, 427 U.S. at 169 ("It is now well established that § 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981, prohibits racial discrimination in the making and enforcement of private contracts."). As for harassment claims, the Court has already recognized that Congress enacted the 1991 Act in part to undo *Patterson's* holding that harassment claims are not cognizable under section 1981, even though the word "harassment" is not included in the amended section 1981. *See Jones*, 541 U.S. at 372-73. Thus it cannot be that the absence of the word "retaliation" from the list of contract-related activities in section 1981(b) means that such claims are not cognizable under section 1981.

Furthermore, in focusing exclusively on the absence of the word "retaliation" from section 1981, Cracker Barrel itself ignores the text of the 1991 Act, which is the best indication of the statute's purpose. The 1991 Act states that the purpose of the Act is "to expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, 105 Stat. at 1071, at Sec. 3(4). Cracker Barrel's

proposed narrow reading of section 1981 to exclude retaliation is at odds with this purpose.

Moreover, it is entirely proper to turn to the legislative history of the 1991 Act to confirm that Congress intended for retaliation, like harassment and discrimination, to be prohibited conduct. That is exactly what the Court did in *Zedner v. United States*, 126 S. Ct. 1976 (2006), where eight Justices acknowledged that the Court's "interpretation [of the Speedy Trial Act] is entirely in accord with the Act's legislative history." *Id.* at 1985 (quoting at length from House and Senate Reports). Indeed, the Court previously relied on the legislative history of this very statute – the 1991 Act – to confirm its conclusion that Congress did not intend the statute to apply retroactively. *See, e.g., Rivers*, 511 U.S. at 305-09; *see also Landgraf*, 511 U.S. at 262 ("The relevant legislative history of the 1991 Act reinforces our conclusion . . . ").

In addition, the relevant legislative history at issue here is the most authoritative of all legislative history – the Committee Reports. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those [members of Congress] involved in drafting and studying proposed legislation.' ") (citations omitted). In this case, the House Committee Report "confirms that Congress intended retaliation to be included within section 1981." Pet. App. 21a; *see also, e.g.*, H.R. REP. NO. 102-40, pt. I, at 90 (1991) ("The list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to,

claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring."), *id.* at 92 ("In cutting back the scope of the rights to 'make' and 'enforce' contracts[,] Patterson also has been interpreted to eliminate retaliation claims that the courts had previously recognized under section 1981. Section 210 would restore rights to sue for such retaliatory conduct.") (citations omitted).[3]

In any event, the Seventh Circuit did not rely "heavily, if not exclusively" on the legislative history. Pet. 9. To the contrary, it was only a small part of the rationale in the *Humphries* decision, and the use of legislative history to confirm the conclusion reached by every circuit court to consider this question is certainly not a reason to grant the writ of certiorari.

D. Cracker Barrel's Policy Argument Regarding Overlap Between Section 1981 And Title VII Is Irrelevant, Wrong, And Not A Reason To Grant The Writ.

Cracker Barrel contends that public policy supports granting the writ because allowing retaliation claims under section 1981 would "eviscerate" certain administrative procedures required under Title VII. Pet. 16. Cracker Barrel argues that the Court should grant the writ to end the "senseless conflict" between Title VII and section 1981. Pet. 17. That is not a proper reason to grant the writ. As the Court has recognized, Congress *intended* to allow plaintiffs to proceed under both Title VII and section 1981

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[3] There was no Senate Committee Report for the 1991 Act. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2183 n.5 (2007) (Ginsburg, J., dissenting).

independently, despite the absence of Title VII's administrative procedures in section 1981:

> [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. In particular, Congress noted "that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, *42 U.S.C. § 1981,* and that the two procedures augment each other and are not mutually exclusive." Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981.

Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975) (citations omitted). *See also Runyon*, 427 U.S. at 174 & n.11 (same). Congress knew in 1991 that overlap existed in the two statutory schemes, but rather than eliminate the overlap, Congress *increased* the coverage of section 1981 to include post-formation conduct, which had the obvious effect of expanding the overlap with Title VII. *Cf.* Civil Rights Act of 1991, § 102(b)(4) ("Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).").

By increasing the coverage of section 1981, Congress recognized that it has a purpose and function beyond any overlap with Title VII. There are many retaliation claims that cannot be brought under Title VII, and removing all retaliation claims from the ambit of section 1981 would leave those plaintiffs with no avenue for relief. For example, employers with fewer than 15 employees are not

covered by Title VII. 42 U.S.C. § 2000e(b). In 1990, the Senate found that section 1981 "is the only federal law banning race discrimination applicable to the 3.7 million firms with fewer than 15 employees." S. REP. NO. 101-315, pt. IV. Independent contractors are not protected by Title VII. 42 U.S.C. § 2000e(b). Neither are employees of bona fide private membership clubs, 42 U.S.C. § 2000e-2(a), certain government entities, 42 U.S.C. § 2000e(b), Indian tribes, *id.*, and Alaska Native Corporations, 43 U.S.C. § 1626(g) (2000).[4] Furthermore, section 1981 applies to all contracts outside the employment context. *See Rivers*, 511 U.S. at 304 ("Moreover, § 1981 (and hence § 101 [of the Civil Rights Act of 1991]) is not limited to employment; because it covers *all* contracts, a substantial part of § 101's sweep does not overlap Title VII.") (emphasis in original, citations omitted). Because there is no overlap between Title VII and section 1981 in a substantial number of employment and non-employment cases, excluding retaliation claims from section 1981 on the basis of a partial overlap with Title VII would be unwarranted.

Moreover, there are compelling public policy arguments in support of the unanimous status quo, which allows retaliation claims to proceed under section 1981. First, removing retaliation claims from the purview of

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[4] The Fourth Circuit's recent decision to join the other circuits on the section 1981 issue is a perfect example of how removing retaliation claims from section 1981 would leave many people without a remedy. In *Aleman*, a Caucasian employee was terminated for reporting discrimination against Hispanic employees. 485 F.3d at 209. His employer was an Alaska Native Corporation, which is not covered by Title VII. 43 U.S.C. § 1626(g). The Fourth Circuit correctly held that retaliation claims are viable under section 1981 and that the exemption for Alaska Native Corporations in Title VII does not apply to section 1981. *Id.* at 213-14.

section 1981 would undermine the statute by giving employers and other contractors free rein to punish individuals for attempting to enforce their rights under the statute. Retaliation must be prohibited by section 1981 to ensure that the statute is "an available and effective remedy for racially motivated employment discrimination." *Choudhury*, 735 F.2d at 43. "[A]n employee who is punished for seeking administrative or judicial relief . . . has failed to secure that right to equal treatment which constitutes the fundamental promise of § 1981." *Id.* Allowing retaliation for reporting discrimination under section 1981 to go unchecked would render the statute meaningless because "[t]he ability to seek enforcement and protection of one's right to be free of racial discrimination is an integral part of the right itself." *Goff v. Cont'l Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982). As this Court explained in the context of Title IX, "[i]f recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Jackson*, 544 U.S. at 180. The Court expressed the same concerns in the context of section 1982. *Sullivan*, 396 U.S. at 237 (noting that without protection against retaliation, the underlying discrimination is perpetuated).

A second policy reason supporting the lower courts' unanimous interpretation of the statute is that recognition of a cause of action under section 1981 will help reduce federal litigation. Allowing employers and other contractors to retaliate against individuals for reporting discrimination would create a strong disincentive for individuals to report discrimination internally in the hopes of resolving the issue without resorting to a federal lawsuit. In the context of employment, instead of encouraging internal dispute resolution, the removal of retaliation claims from section

1981 would only encourage employees to file suit without first allowing the employer to remedy the situation. *Compare with Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing affirmative defense in Title VII harassment cases where employer can avoid liability if the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer"). Thus, in addition to the substantive legal reasons for denying Cracker Barrel's petition, these policy reasons support the denial as well.

Even if this Court were inclined to address the limited overlap between Title VII and section 1981, this is not the proper case to highlight any potential abuse of that overlap. Mr. Humphries did not circumvent the administrative procedures required by Title VII. He timely filed a charge with the EEOC, which investigated and issued a right-to-sue letter. Therefore, even if the limited overlap were a legitimate concern and a reason to grant the writ, the facts of this case do not put the issue squarely before the Court.

E. This Case Is An Inappropriate Vehicle For Deciding Whether Retaliation Claims Are Cognizable Under Section 1981 Because Cracker Barrel Forfeited The Issue By Failing To Raise It Before The District Court.

Finally, the Court should deny the writ because Cracker Barrel forfeited the issue when it failed to argue in the district court that retaliation claims are not cognizable under section 1981.[5] The Seventh Circuit acknowledged

[5] Mr. Humphries preserved this argument by timely presenting it to the Seventh Circuit. Pet. App. 5a-7a.

that Cracker Barrel forfeited the section 1981 issue but nevertheless chose to consider and resolve it "in the interests of justice." Pet. App. 7a. Justice, however, would only be served if this Court denies review of the section 1981 issue because, based on Cracker Barrel's inaction in the district court, Mr. Humphries proceeded solely on his section 1981 claims after the district court dismissed his Title VII claims.

Contrary to Cracker Barrel's implication (which was echoed by Judge Easterbrook in his dissent below), Pet. 16, Pet. App. 41a, Mr. Humphries timely filed a charge of discrimination and retaliation with the EEOC. He also timely filed his *pro se* complaint in the district court, raising claims under both Title VII and section 1981. The district court dismissed the Title VII claims only because Mr. Humphries tried unsuccessfully to proceed *in forma pauperis* and missed the ninety-day deadline for paying his filing fee. After the district court's denial of his IFP application, Mr. Humphries – still proceeding *pro se* – filed two amended IFP applications to clarify issues raised by the district court. The court nevertheless denied both amended applications and ordered Mr. Humphries to pay the fee. Although Mr. Humphries paid the fee, the district court dismissed the Title VII claims because more than ninety days had passed since Mr. Humphries had received his right-to-sue letter.

Despite having compelling arguments that the district court abused its discretion in dismissing the Title VII claims, Mr. Humphries did not appeal those dismissals because he had viable claims under section 1981. Had Cracker Barrel put Mr. Humphries on notice in the district court that it was challenging the viability of his section 1981 retaliation claim, Mr. Humphries would have certainly appealed the dismissal of his Title VII retaliation

claim. Instead of raising the issue in the district court, Cracker Barrel sandbagged Mr. Humphries by raising the section 1981 issue only after it was too late to appeal the dismissal of his Title VII retaliation claim. If the Court were to grant review of this case, it would not only severely prejudice Mr. Humphries, but it would encourage such tactics and reward parties for failing to raise issues in the lower courts. Therefore, in addition to the unanimity in the circuits and controlling Supreme Court precedent on the section 1981 issue, the Court should deny the writ due to Cracker Barrel's inaction in the district court.

CONCLUSION

Cracker Barrel has not established any reason for this Court to grant its petition for a writ of certiorari. Therefore, Mr. Humphries respectfully requests that the petition be denied.

Respectfully submitted,

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